

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CYNTHIA M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. C20-5104 RAJ

**ORDER REVERSING THE
COMMISSIONER'S FINAL
DECISION AND REMANDING
FOR FURTHER
ADMINISTRATIVE
PROCEEDINGS**

Plaintiff appeals denial of her applications for Supplemental Security Income and Disability Insurance Benefits. Plaintiff contends the ALJ erred by discounting her testimony and three treating providers' medical opinions. Dkt. 9. As discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff is 49 years old, has a high school education, and has worked as a stock clerk and night auditor. Dkt. 7, Admin. Transcript (Tr.) 28, 49, 51. Plaintiff alleges disability as of June 17, 2015. Tr. 15. After conducting a hearing in October 2018, the

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ADMINISTRATIVE PROCEEDINGS - 1

1 ALJ issued a decision finding Plaintiff not disabled. Tr. 35-130, 15-29. The ALJ found
2 Plaintiff had severe impairments including fibromyalgia, several spinal impairments,
3 anxiety disorder, major depressive disorder, and posttraumatic stress disorder. Tr. 17.
4 The ALJ concluded Plaintiff could perform simple, routine work at the light exertional
5 level, occasionally interacting with coworkers and the public. Tr. 20.

6 DISCUSSION

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8 This Court may set aside the Commissioner's denial of Social Security benefits
9 only if the ALJ's decision is based on legal error or not supported by substantial evidence
10 in the record as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017).

11 A. Plaintiff's Testimony

12 Where, as here, an ALJ determines a claimant has presented objective medical
13 evidence establishing underlying impairments that could cause the symptoms alleged,
14 and there is no affirmative evidence of malingering, the ALJ can only discount the
15 claimant's testimony as to symptom severity by providing "specific, clear, and
16 convincing" reasons supported by substantial evidence. *Trevizo*, 871 F.3d at 678.

17 1. Physical Symptoms

18 The ALJ discounted Plaintiff's physical symptom testimony based on lack of
19 supporting medical evidence, lack of specialized treatment, improvement with treatment,
20 and conflict with her activities. Tr. 24-25. "[L]ack of medical evidence cannot form the
21 sole basis for discounting pain testimony...." *Burch v. Barnhart*, 400 F.3d 676, 681 (9th
22 Cir. 2005).

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ORDER REVERSING THE
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ADMINISTRATIVE PROCEEDINGS - 2

1 **a. Lack of Treatment**

2 The ALJ found Plaintiff was not undergoing treatment from a specialist, such as a
3 rheumatologist, for her fibromyalgia. Tr. 25. An “unexplained, or inadequately
4 explained, failure to seek treatment or follow a prescribed course of treatment” can
5 constitute a sufficient reason for discrediting a claimant’s symptom testimony. *Fair v.*
6 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Here, however, Plaintiff did seek treatment
7 for her fibromyalgia and there is no indication she did not follow prescribed treatment.
8 *See, e.g.*, Tr. 959 (follow up for fibromyalgia), 962 (confirming Plaintiff was diagnosed
9 and treated for fibromyalgia). The record indicates a rheumatologist confirmed the
10 fibromyalgia diagnosis, and ALJ identified no evidence in the record showing Plaintiff
11 needed to continue treatment with a rheumatologist or other specialist. *See* Tr. 73-74.
12 Lack of specialized treatment was not a clear and convincing reason to discount
13 Plaintiff’s testimony.

14 **b. Improvement with Treatment**

15 “[E]vidence of medical treatment successfully relieving symptoms can undermine
16 a claim of disability.” *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017).
17 However, evidence of “some improvement does not mean that the person’s impairments
18 no longer seriously affect her ability to function in a workplace.” *Holohan v. Massanari*,
19 246 F.3d 1195, 1205 (9th Cir. 2001).
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21 Here, despite some improvement from physical therapy and medication, neither
22 the ALJ nor the Commissioner cites evidence of such improvement that Plaintiff’s
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1 symptoms were successfully relieved or that her testimony was contradicted. Plaintiff
2 benefited from physical therapy but continued to experience extremely limiting
3 symptoms. *See* Tr. 1050 (improved, but still reporting frequent upper extremity
4 numbness), 1052 (“continual numbness and tingling into bilateral” upper extremities),
5 1054 (therapy “beneficial” but still experiencing neck flare-ups), 1056 (continuing to
6 have “minor” flare-ups), 1058 (still having flare-ups but “less aggressive and fewer”),
7 1060 (“still needs frequent days of complete rest to bounce back” after activity), 1062
8 (“variable improvement”). At the last visit in the record Plaintiff reported increased
9 symptoms and pain preventing her from following the home exercise program. Tr. 1064.

11 Plaintiff testified her medication “lessens” the pain, otherwise she “couldn’t really
12 move.” Tr. 72. Yet she continues to have several days a week where she can do little
13 other than lie on a couch. Tr. 100.

14 Improvement with treatment was not a clear and convincing reason to discount
15 Plaintiff’s testimony.

16 **c. Activities**

17 The ALJ did not cite any activities that contradicted Plaintiff’s testimony or met
18 the threshold for transferable work skills. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
19 2007). “Only if the level of activity were inconsistent with Claimant’s claimed
20 limitations would these activities have any bearing on Claimant’s credibility.” *Reddick v.*
21 *Chater*, 157 F.3d 715, 722 (9th Cir.1998). The ALJ cited caring for her son, who was
22 seven years old at the time of the hearing. Tr. 25, 82. Plaintiff testified she taught her
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1 son to do many things, such as prepare food for himself, including using the oven with
2 monitoring or using the microwave, so his basic needs can be met when she has a “bad
3 day.” Tr. 88-89. Her son is in school all year and his school bus provides “door-to-door”
4 pickup, so Plaintiff does not need to bring him to school or even to a bus stop. Tr. 85,
5 100. The ALJ also cited doing household chores such as laundry, but Plaintiff testified it
6 causes a fibromyalgia flare-up, necessitating lying down for about a day. Tr. 112.
7 Conflict with activities was not a clear and convincing reason to discount Plaintiff’s
8 testimony.
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10 The Court concludes the ALJ erred by discounting Plaintiff’s physical symptom
11 testimony.

12 **2. Mental Symptoms**

13 The ALJ discounted Plaintiff’s mental symptom testimony based on inconsistency
14 with medical evidence, lack of treatment, improvement with treatment, and inconsistency
15 with her activities. Tr. 24-25.

16 **a. Inconsistency with Medical Evidence**

17 The ALJ found Plaintiff’s testimony inconsistent with a treatment note indicating
18 Plaintiff was “negative for depression.” Tr. 25. However, the same treatment note shows
19 anxiety, consistent with Plaintiff’s testimony of anxiety. Tr. 998, 113. Most records the
20 ALJ cited as showing normal mood and affect report high levels of anxiety. Tr. 1078,
21 1079, 1080, 1084. Only one record, for a gynecological appointment, reports only
22 normal mood and affect. Tr. 924. This single note, from an appointment not focused on
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1 mental health, does not constitute a clear and convincing reason to discount Plaintiff's
2 testimony.

3 **b. Lack of Treatment**

4 The ALJ found Plaintiff had "minimal counseling," despite stating at the hearing
5 Plaintiff "did have some extensive counseling." Tr. 25. There is no indication Plaintiff
6 failed to seek treatment or follow treatment recommendations. In fact, Plaintiff's
7 psychiatrist stated she was "doing an excellent job of working on non-pharmacologic
8 treatments including ... psychotherapy." Tr. 969. Lack of treatment was not a clear and
9 convincing reason to discount Plaintiff's testimony.

10 **c. Improvement with Treatment**

11 Plaintiff testified with mental health treatment her "anxiety level is a little bit
12 better." Tr. 65. Part of the coping skills she has developed include "making sure [she
13 has] time for recovery." Tr. 66. For example, the day after the hearing she made sure to
14 have "nothing planned." *Id.* Even with this improvement with treatment, she is
15 uncomfortable going out of her home. Tr. 70. This level of improvement does not show
16 successful relief of symptoms or otherwise contradict Plaintiff's testimony.

17 **d. Activities**

18 The ALJ cited Plaintiff getting her hair done and spending a lot of time doing
19 paperwork to maintain her and her son's government benefits, but failed to explain how
20 this contradicts Plaintiff's testimony. Conflict with activities was not a clear and
21 convincing reason to discount Plaintiff's testimony.
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1 The Court concludes the ALJ erred by discounting Plaintiff's mental symptom
2 testimony.

3 **B. Medical Opinions**

4 An ALJ may only reject the contradicted opinion of a treating doctor by giving
5 "specific and legitimate" reasons. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017).

6 An ALJ may reject the opinion of a non-acceptable medical source, such as a physical
7 therapist, by giving reasons germane to the opinion. *Ghanim v. Colvin*, 763 F.3d 1154,
8 1161 (9th Cir. 2014).

9 **1. Treating Physician Ellen Kim, M.D.**

10 The ALJ gave Dr. Kim's opinions of significant physical limitations and
11 concentration difficulty due to pain little weight as inconsistent with "fairly
12 unremarkable" clinical findings. Tr. 25, 962-64. However, with fibromyalgia, normal
13 clinical findings are expected. "The condition is diagnosed 'entirely on the basis of
14 patients' reports of pain and other symptoms,' and 'there are no laboratory tests to
15 confirm the diagnosis.'" *Revels*, 874 F.3d at 666. The Commissioner asserts, without
16 support from the record, that "[c]learly, there would be" abnormal muscle tone, atrophy,
17 or gait if Dr. Kim's opinions were correct. Dkt. 10 at 9. The Commissioner's
18 unsupported assumption is not a specific and legitimate reason to discount Dr. Kim's
19 opinions.
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1 The ALJ also found concentration difficulty inconsistent with mental status
2 findings. Tr. 25. However, Dr. Kim opined difficulty concentrating due to pain, not
3 mental impairments.

4 The Court concludes the ALJ erred by discounting Dr. Kim's opinions.

5 **2. Treating Physical Therapists Bernard Bansil and Brock Giannaris**

6 The ALJ gave Mr. Bansil's and Mr. Giannaris' opinions of physical limitations
7 and likely absences from work at least three days per month little weight as inconsistent
8 with clinical findings. Tr. 27. The opinions were based on fibromyalgia. Tr. 1103.
9 Thus, normal clinical findings are to be expected. *Revels*, 874 F.3d at 666. The Court
10 concludes the ALJ erred by discounting Mr. Bansil's and Mr. Giannaris' opinions.
11

12 **CONCLUSION**

13 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and
14 this case is **REMANDED** for further administrative proceedings under sentence four of
15 42 U.S.C. § 405(g).

16 On remand, the ALJ should reevaluate Plaintiff's testimony, Dr. Kim's opinions,
17 and Mr. Bansil's and Mr. Giannaris' opinions; reassess the RFC as appropriate; and
18 proceed to step five as necessary.

19 DATED this 2nd day of September, 2020.

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22 The Honorable Richard A. Jones
23 United States District Judge